

Message Text

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C O N F I D E N T I A L STATE 085361

E. O. 11652: GDS

TAGS: PFOR, UN

SUBJECT: DEFINITION OF AGGRESSION COMMITTEE: LEGAL

USES OF FORCE

REF: (A) GENEVA 2033; (B) GENEVA 2045

DEPT HAS TACTICAL PROBLEMS WITH LANGUAGE DISCUSSED

IN 6- POWER GROUP RE LEGAL USES OF FORCE.

IT IS NOT CLEAR FROM REFTELS WHETHER DEL HAS SOUGHT TO
OBTAIN AGREEMENT EVEN AMONG THE 6 POWERS ON A GENERAL
SAVING CLAUSE, I. E., WHICH WOULD OMIT FROM ACTS CON-
STITUTING AGGRESSION THOSE " CARRIED OUT UNDER CIRCUMSTANCES
AND IN A MANNER WHICH RENDERS THE ACT A LAWFUL USE OF FORCE
UNDER THE CHARTER" IN WHICH CASE, THE DEL, AS STATED
IN THE POSITION PAPER, WOULD SEEK TO ELIMINATE SUCH
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SPECIFIC REFERENCES TO SELF- DEFENSE AND OTHER SITUATIONS IN WHICH USE OF FORCE IS LEGAL. EVEN IN ABSENCE OF 6- POWER AGREEMENT ON THE ABOVE SAVING CLAUSE, IT IS NOT CLEAR WHETHER DEL IS CONTINUING TO SUPPORT ALTERNATIVE 1 OF THE WG REPORT (P. 16) " NOTHING IN THIS DEFINITION SHALL BE CONSTRUED AS ENLARGING OR DIMINISHING IN ANY WAY THE SCOPE OF THE PROVISIONS OF THE CHARTER CONCERNING CASES IN WHICH THE USE OF FORCE IS LAWFUL."

DEPT CONTINUES TO PREFER EITHER SAVING CLAUSE TO

THE SPECIFICATION OF SELF- DEFENSE AND OTHER LEGAL USES OF FORCE AND REGARDS SUCH A SAVING CLAUSE AS SUFFICIENT. WE NOTE IN PARA 4 OF REFTEL (B) THAT SPECIFICATION OF SELF- DEFENSE IN GIVEN CONTEXT CARRIES POSSIBLE IMPLICATION THAT THERE IS NO RIGHT OF SELF- DEFENSE AGAINST AN ACT NOT INCLUDED IN THE LIST. USE OF EITHER SAVING CLAUSE WITHOUT PRIOR OR ADDITIONAL MENTION OF SELF- DEFENSE, ETC., WOULD OBIVATE THIS DIFFICULTY.

HOWEVER, IF EFFORTS TO OBTAIN ACCEPTANCE OF SAVING CLAUSE HAVE FAILED, DEPT COULD ACCEPT FORMULATION OF LANGUAGE AS DRAFTED IN REFTEL A WITH EXCEPTION OF PRO- PORTIONALITY LANGUAGE, " IF THEY DO NOT INVOLVE A USE OF FORCE BEYOND THAT WHICH IS REASONABLY NECESSARY FOR THE EFFECTIVE EXERCISE OF THE RIGHT OF SELF- DEFENSE."

THE PROBLEM IS THAT THE PHRASE CAN BE READ AS A NARROW CIRCUMSCRIPTION OF THE RIGHT OF SELF- DEFENSE BY IMPLYING THAT EACH INCIDENT MUST BE TREATED AS SELF- CONTAINED AND BYIMPLYING THAT EVEN SLIGHTLY MORE FORCE THAN HINDSIGHT SHOWS TO BE NECESSARY WOULD CONSTITUTE AGGRESSION. ANY ACCEPTABLE STANDARD OF PROPORTIONALITY MUST CLEARLY MAKE RELEVANT, NOT MERELY THE IMMEDIATE HOSTILE ACT, BUT ALSO THE HISTORY AND CONTEXT IN WHICH IT OCCURS, THE PERCEIVED THREAT, AND THE NEEDS OF DEFENSE AGAINST THAT THREAT. MOREOVER, IT SHOULD BE CLEAR THAT IT IS NOT ANY SUBSEQUENT EVALUATION OF EVENTS THAT IS RELEVANT, BUT RATHER THE FACTS AND THE THREAT AS THEY APPEARED AT THE TIME. IN OTHER WORDS, IN ORDER TO BECOME AGGRESSION, ACTIONS TAKEN IN SELF- DEFENSE MUST BE CLEARLY

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DISPROPORTIONATE TO THE OVERALL NEEDS OF SELF- DEFENSE. WE CAN STIGMATIZE THE USE OF A MINOR INCIDENT AS A PRETEXT FOR ALL OUT WAR BUT WE MUST NOT, REPEAT NOT, STIGMATIZE ACTIONS WHICH MIGHT LATER BE SEEN AS MISTAKES IN JUDGMENT OR ACTIONS WHICH ARE NOT CLEARLY A DISPROPOR- TIONATE RESPONSE TO A SERIES OF HOSTILE ACTIONS AND THE THREAT THEY POSE BUT WHICH MIGHT BE DISPROPORTIONATE

TO THE IMMEDIATELY PREC

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